argument and the conclusion I have come to is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof. Undoubtedly it is upon the Crown, and, as I cannot bring myself to a conclusion, either way, whether Mr. Winans did or did not intend to change his domicil, his domicil of origin must remain, ... ".

In this case the burden of proof is upon the petitioner and she has not discharged that burden. It appears to the Court that the domicil of the parties at the time when the petition was presented was in Ceylon and that the Court accordingly has no jurisdiction. The petition is therefore dismissed with costs for the respondent.

One final remark I wish to make. Counsel for the petitioner made a moving appeal relative to the hardships suffered by the petitioner which went more to the substance of the petition upon which I have heard no evidence than upon the preliminary point of domicil. There can be no doubt that there are extremely hard cases occasioned by the fact that a wife has the domicil of her husband but that is no reason for relaxing standards of proof. The remedy lies in express legislation as in the United Kingdom relating to divorce petitions by "G.I. brides" . No doubt if a good case exists the legislature will extend the jurisdiction of the Court to receive the petition of a wife who is a Federal citizen and resident here even though her husband is domiciled outside the Federation. One must not forget, however, that one hard case will not necessarily make good law.

Petition dismissed.

Solicitors: *R. P. S. Rajasooria; Lovelace & Hastings.*

R. C. H. LIM & Co. v. M. LEE

[O. C. J. (Taylor J.) May 25, 1956]

[Singapore — Suit No. 1672 of 1955]

Rules of the Supreme Court, 1934, O. 14 — Appeal against Registrar's order granting leave to enter judgment — Final judgment drawn and entered — Whether can be set aside.

Costs — Solicitor conducting his own litigation.

The plaintiffs are a firm of solicitors who have acted for the defendant, a real estate developer, in many transactions over a long period. A large sum in respect of fees having been outstanding for some time, the plaintiffs issued a specially indorsed writ for $16,000. The defendant in person entered an appearance to the writ. The plaintiffs issued a summons for final judgment under R.S.C., O. 14, r. 1, which came before the Registrar who allowed an adjournment at the defendant's request to enable him to file an affidavit. On the defendant's failure to file such an affidavit and to attend on the resumed date the Registrar made an order granting leave to the plaintiffs to enter final judgment. The defendant gave notice of appeal from this order. The final judgment was drawn up and entered but there was no application for the judgment to be set aside.

Held: (1) the appellant should be put as nearly as possible in the position in which he would have been if he had made his whole case at the proper time but on terms, especially as to cost;

(2) if the order giving leave to enter the judgment is set aside, the judgment itself must also be set aside, otherwise the whole proceedings would be abortive;

(3) a judgment cannot be set aside except on a process expressly seeking that relief; as the appellant had not specifically applied to set aside the judgment he must amend his notice of appeal by adding a prayer that the judgment be set aside, and subject to that, both the order of the Registrar and the judgment would be set aside;

(4) if an appellant alleges an error in law or a wrong exercise of discretion he should ask the Registrar to record the reasons for his decision and these should be put on the file before the matter comes before a Judge.

Where a solicitor conducts litigation on his own behalf he is entitled to ordinary professional costs except for certain items which are inapplicable in fact, for instance, he cannot attend upon himself.

Cases referred to:—

(1) *Spira v. Spira* (1939) 3 All E.R. 924.

(2) *Evans v. Bartlam* (1937) 2 All E.R. 646.

(3) *Nash v. Rochford Urban Council* (1917) 1 K.B. 393.

APPLICATION adjourned into Court for further argument.

C. F. J. Ess for the plaintiffs.

R. H. Green for the defendant.

Taylor J. : — This is an application by Summons which was adjourned into Court for further argument.

The plaintiffs are a firm of solicitors who have acted for the defendant, a real estate developer, in many transactions over a long period. A large sum in respect of fees having been outstanding for some time, the plaintiffs issued a specially endorsed writ for $16,000. The defendant in person entered an appearance to the writ. The plaintiffs issued a summons for final judgment. The affidavit shows that this was under O. 14, r. 1. The summons came on for hearing before the Registrar on 30th January last; the defendant attended in person; he had not filed any affidavit and did not disclose any defence to the actual claim but he said that he had a counter-claim and asked for an adjournment to enable him to file an affidavit stating the relevant facts. The Registrar accordingly adjourned the matter to 3rd February. On that day one of the plaintiffs, acting as solicitor for his own firm, attended. The defendant did not attend and he had not filed any affidavit. The Registrar granted leave to enter final judgment. The defendant personally saw the Registrar later on the same morning and learned of the order. He then instructed solicitors and on 7th

February they gave notice of appeal from the Registrar's Order. The matter came before a Judge on 10th February and after some inconclusive argument it was adjourned, stay of execution being granted on terms. The final judgment was drawn up and entered on 23rd February. Eventually the matter was adjourned into Court and argued *de novo* before me.

The first problem is one of procedure. We have here not one instrument but two — the order of the Registrar, which gave leave to enter judgment, and the judgment itself, which was afterwards entered by the plaintiff and which, when entered became a final judgment of the Court. The application is to set aside the order of the Registrar and substitute an order giving leave to defend. An order in these terms would not, of itself, set aside the judgment and so long as the judgment stands leave to defend cannot be given.

The judgment is not a default judgment. The defendant had entered an appearance so Order 13 clearly does not apply. He was not required to file a defence. It would have sufficed under O. 14, r. 2 if he had orally satisfied the Registrar that he was entitled to defend. There was therefore no default of defence and the judgment is not one which can be set aside under O. 28 r. 15, *Spira v. Spira*[1]. This is not a satisfactory report but the observations of the Lords Justices lend some support to the view that the procedure adopted by the defendant in this case is correct; they do not, however, cover all the ground. O. 51, r. 21 provides two courses. Where the party is present and gives oral notice of appeal then and there, the Registrar endorses the summons and the matter is put in the Judge's list without further process; alternatively a party who is dissatisfied, whether he was present or not, may give a notice of appeal. The Registrar's Order need not be drawn up. In the former case it obviously would not be drawn. In the latter it might have been but where the party acted within the very short time allowed it would very rarely occur that the further step of entering judgment would have been taken. In this case that further step was not taken until after the appeal had been brought before a Judge and stay of proceedings had been asked for and refused. O. 34 r. 32 does not apply because the proceedings before the Registrar are not a trial. The question is whether there is any means by which a summary judgment which is neither by default nor irregular can be set aside. It was on this issue that I adjourned the matter into Court. Counsel for the defendant did not cite any direct authority and in view of the inconclusive nature of the comparatively recent case of *Spira, supra,* it is unlikely that any direct authority can be found. It appears to be a new point which must be decided on principle.

Evans v. Bartlam[2] is clearly distinguishable because there the judgment was a default judgment but the speeches are helpful as to principles.

Proceedings before the Registrar are, in general, interlocutory and summary. He seldom hears *viva voce* evidence or full argument. Appeals from his decisions differ in nature from appeals from decisions at trials in lower Courts. The matter is heard *de novo* by the Judge and additional material may be adduced without special leave. The Judge has regard to the reasons of the Registrar, if these appear, but is not bound by his findings in the same way as appellate Courts are bound by findings at trials at first instance. Generally speaking, the appellant has a lighter onus and the Court more latitude.

The appellant should be put as nearly as possible in the position in which he would have been if he had made his whole case at the proper time but on terms, especially as to costs.

It follows from this that if the order giving leave to enter the judgment is set aside, the judgment itself must also be set aside, otherwise the whole proceeding would be abortive. There is clearly no objection in principle because a judgment obtained where the defendant fails to attend on the day fixed for trial can be set aside. The case of failure to attend a summary application in the Registrar's chambers is *a fortiori.* I am therefore of opinion that where the order is set aside, there must, by necessary implication, be power to set aside the consequential judgment.

As a matter of procedure, however, a judgment cannot be set aside except on a process expressly seeking that relief and here there is no such application. Our rules do not provide any form for an appeal of this kind. The English practice is available to supply omissions and the defendant's solicitors accordingly drew their notice, following the English form 18a in Part II of Appendix B [1956 White Book, p. 2559]. This form clearly shows that the relief sought should be stated. The notice prays that the Registrar's order be discharged and an order giving leave to defend substituted. That was correct and adequate when it was filed but when the judgment was entered it became insufficient. So long as the judgment stands, it precludes any defence to the claim. The defendant should have applied to amend his notice of appeal by adding a prayer that the judgment be set aside.

As regards the merits, there is no question of any mistake; the defendant attended the first hearing before the Registrar and knew perfectly well the time and place of the further hearing granted at his request. His failure to attend was, on the view most favourable to him, attributable to nothing

but his own carelessness. The date when he first consulted his present solicitors does not appear but it is clear that at some date between the first hearing before the Registrar and the filing of his notice of appeal he realised that his cross claim is a claim not against the plaintiff firm but against one of the partners personally. It cannot properly be pleaded as a counter-claim and he has instituted a separate suit. The defence which he could have raised at the adjourned hearing, if he had taken advice in reasonable time, and which he now asks leave to plead, is limitation and, on any view, it applies to part only of the claim. Counsel submitted that the claim is for the aggregate of twenty-three separate bills about half of which are more than three years old. This is not correct. The statement of claim alleges plainly that on a date which is not stated the parties agreed on certain deductions amounting to $12,000. The claim is for an agreed amount stated, of $32,000 less $12,000, that is $20,000, subject to an adjustment of $2,000, and a subsequent payment to account of $2,000, making a net claim of $16,000. Counsel denied the alleged agreement. In my view he was not entitled to do so. Quite apart from it being an odd thing to dispute a concession of $12,000 the position is that on 7th February, seven weeks after he had entered an appearance to the writ, the defendant, with the aid of his solicitors, filed an elaborate affidavit; ten days later he filed a further affidavit and he had three months more in which to file an additional affidavit, had he so wished, but nowhere has he challenged the agreement in any way. Counsel said that there is no evidence of the existence of the agreement but that was an erroneous attempt to shift the onus. It is for the defendant to satisfy the Court of the facts on which he relies. The facts regarding the alleged agreement are clearly within his personal knowledge; he has had abundant opportunity to adduce evidence but he has remained silent. For the purpose of this application it must be inferred that he cannot give evidence denying the existence of the agreement.

Counsel also contended that the judgment ought to be set aside on the ground that it is for an erroneous amount. Two points were specified. The first is that one of the bills is in the name of the defendant's wife and that he is not personally liable. It is true that this affects the total amount of the judgment but it is not an error. The dispute is as to liability for the whole of that bill, not as to the amount. The other complaint is as to the sum of $315 for costs included in the judgment. Where a solicitor conducts litigation on his own behalf he is entitled to ordinary professional costs except for certain items which are inapplicable in fact; for instance, he cannot attend upon himself. It was submitted that these costs include attendances and that the amount of $315 is therefore erroneous. The amount is a fixed inclusive charge, being Item 249 of Schedule C. It is true that this amount would be the same if another solicitor had been employed but if we are to distinguish it would be necessary to draw up and tax a fully itemised bill. The total of such a bill would almost certainly be more than the consolidated fee. When the inapplicable items had been deducted it might be somewhat less but the costs of the bill and of taxation would offset this and if the final result were less than $315 it would be by so small a margin as to be negligible. The error, if any, is a mere fraction of one per cent of the claim. The judgment cannot be set aside on this ground.

The plaintiffs argued that as the defendant had failed to put his case forward at the proper time he should not be allowed to try again, *Nash v. Rochford Urban Council*[3], but that principle does not apply here because the proceeding was not a trial.

The applicant has shewn reasonable grounds of defence only to the one bill in his wife's name and to some of the others which may be barred by limitation but which cannot be specified because the particulars in the endorsement are insufficient.

The defendant must first amend his notice of appeal by adding a prayer that the judgment be set aside. Subject to that, both the order of the Registrar and the judgment will be set aside. The plaintiffs must then give particulars shewing the date of the agreement, the date of each bill and the apportionment of the $12,000 among the bills which were reduced. The defendant will give fourteen days from the delivery of the particulars within which to file a defence to the claim on the bill in his wife's name and on such of the other bills as he may then be advised are barred by limitation. The plaintiffs will then have fourteen days to reply. They may, if so advised, apply for judgment for so much of the claim as appears to be undefended. The defendant must pay the costs of this appeal.

As regards the money in Court, I think that it should remain until the further interlocutory proceedings have ended. It is impossible to estimate, on the present pleadings, how much of the claim will be defended but when the further interlocutory judgment, if any, and the costs have been paid, I think the defendant should be at liberty to withdraw the balance.

It may perhaps be helpful if I add a word regarding the reasons for the Registrar's decision. At one stage of this appeal it was suggested that the matter could not proceed until the reasons had been recorded but in the end they were never supplied. In other recent appeals from the Registrar, however, it has been necessary to

adjourn the proceedings because the grounds of the decision complained of did not appear. In my view the correct practice is this. If the appellant alleges an error in law or a wrong exercise of discretion he should ask the Registrar to record the reasons for his decision and these should be put on the file before the matter comes before a Judge; usually they are not lengthy and no delay will result. In a minority of cases, of which is this one, it is conceded that the Registrar's decision was correct, as the case was presented to him, and the "appeal" is based on fact not then known or arising later; in such circumstances his reasons are not required.

Order accordingly.

Solicitors: *R. C. H. Lim & Co.; Braddell Bros.*

DAENG MOHAMADALLY v. THANAPAKIAM

[A. C. J. (Chua J.) March 14, 1957]

[Singapore — District Court Appeal No. 6 of 1956]

Landlord and Tenant — Licence or tenancy — Intestate tenant — Notice to quit — Service on person in occupation.

The Courts should only infer a new tenancy where the facts truly warrant it. The test to be applied in Rent Control Cases is the same test as that laid down by Lord Mansfield in cases of holding over: "The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was?"

Where the tenant had abandoned the tenancy and is dead the landlord may determine the tenancy by serving a notice to quit on the occupier of the premises.

[Editorial Note: See Note on "Validity of Notice to Quit" in (1952) M.L.J. xxiii].

Cases referred to:—

(1) *Marcroft Wagons Ltd. v. Smith* (1951) 2 K.B. 496.

(2) *Harrowby (Earl of) v. Snelson* (1951) 1 All E.R. 140.

(3) *Sweeny v. Sweeny* (1876) I.R. 10 C.L. 375.

(4) *Weimberg v. Lim Seow Peng* (1955) M.L.J. 152.

DISTRICT COURT APPEAL.

P. F. X. Leonard for the appellant.

L. A. J. Smith for the respondent.

Chua J.: — This is an appeal from the judgment of the learned District Judge relating to the possession of premises No. 10 Kirk Terrace, Singapore.

It is not disputed that the said premises are subject to the provisions of the Control of Rent Ordinance 1953.

The facts are these. Sometime in March 1942 the said premises were let out by the then owner to one Mohamed Ariff, the brother of the appellant, but it was the appellant who lived in the said premises from that date and who paid the rent to the landlord. The rent receipts, however, were in the name of Mohamed Ariff. Mohamed Ariff never resided at No. 10 Kirk Terrace.

On the 9th October 1954 the respondent bought the said premises and she was informed by the vendor that the tenant of the said premises was Mohamed Ariff. The rent for October 1954 was paid to the respondent who issued the receipt in the name of Mohamed Ariff.

Mohamed Ariff died on the 30th September 1954 but this fact came to the knowledge of the respondent only after the October rent had been paid. On the 22nd November 1954 the respondent served a notice to quit on the appellant and the widow of Mohamed Ariff.

In the District Court the respondent claimed possession of the said premises on the ground that the appellant was a trespasser. The appellant contended that he was the real tenant of the said premises. The learned District Judge rejected the contention of the appellant and gave possession to the respondent.

At the hearing of this appeal, Counsel for the appellant conceded that originally Mohamed Ariff became the tenant of the said premises but submitted that the appellant was an assignee, express or implied, of Mohamed Ariff or alternatively he was a sub-tenant at will of Mohamed Ariff. These points were never raised in the District Court.

Counsel for the appellant pointed out that the appellant had exclusive occupation of the said premises and that was by reason of an agreement between the appellant and Mohamed Ariff. But is exclusive occupation alone sufficient to support the contention that there was an assignment of the tenancy by Mohamed Ariff to the appellant? I do not think so. There was no assignment in writing. On the 26th September 1947 Mohamed Ariff was served with a notice (Exhibit P6) by the landlord asking him to quit and offering him a fresh tenancy on new terms if he wished to remain. The acceptance of the offer of the fresh tenancy was signed by the appellant on behalf of his brother. If there had already been an assignment of the tenancy to the appellant by his brother why did he not inform the landlord? I hold that there was no assignment of the tenancy to the appellant.

Counsel for the appellant also urged upon me that if there was no assignment of the tenancy then as the appellant had exclusive occupation and was paying the rent of the said premises to the landlord it was the intention of Mohamed Ariff that the appellant should become his sub-tenant at will. As pointed out by Counsel for the respondent this was an issue which had to be decided on the evidence. In the lower court the appellant claimed that he was the real tenant, he did not claim that he was the sub-tenant of Mohamed Ariff.